COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1625 **Cir. Ct. No. 2004CV1259**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STEVE USELMANN, D/B/A REMODELERS PLUS,

PLAINTIFF-APPELLANT,

V.

SHAWN KLINZING,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed in part; reversed in part.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Steve Uselmann appeals from a judgment dismissing his claim that Shawn Klinzing owes him money under a home construction contract and finding that his action was frivolous. We conclude that the evidence supports the trial court's finding that Uselmann breached the contract

and Klinzing did not owe any additional sums under the contract and affirm that part of the judgment. We reverse the determination that the action was frivolous and reverse that part of the judgment awarding Klinzing costs and attorney fees.

¶2 In April 2003, Klinzing contracted with Uselmann for the construction of a new home for the sum of $166,290. The contract provided that the house would be constructed "as per plan." Attached to the contract were drawings showing dimensions and a floor plan for the house. The contract also provided that the entire project "should be completed 6 months from the time ground is broken given average rainfall and unforeseeable problems." Construction started in July 2003 with excavation of the site and pouring of the concrete foundation. The resulting foundation was three feet higher than the recommended foundation elevation on the survey completed to obtain the building permit. By a July 28, 2003 letter, Uselmann acknowledged the mistake in the foundation and promised to pay for extra costs caused by the foundation being three feet too high. Uselmann's progress on the project slowed. By a letter of January 8, 2004, when the house was still unfinished, Klinzing terminated the contract. Klinzing finished the house himself.

¶3 Uselmann commenced this action to recover $60,760 left unpaid on the contract. Klinzing filed a counterclaim alleging that Uselmann had breached the contract by constructing the foundation three feet over specifications, failing to provide quality workmanship, and failing to complete the project within the time promised. He sought to recover the decreased market value caused by the foundation error, the value of labor and materials he used to complete the house, and monies Uselmann withdrew from the construction fund in excess of the value of work Uselmann performed.

¶4 The case was tried to the court. The trial court found that Uselmann did very little work on the project during September and October 2003 because the issue of the foundation elevation had not been satisfactorily resolved between the parties. It found that Klinzing had not done anything to delay payments of Uselmann's draw requests. It found that by January 2004 the house was nothing more than a shell; there was no drywall, no insulation, and siding was not complete. It found the stairs constructed by Uselmann did not pass inspection and had to be redone by Klinzing. The court concluded that Uselmann had not substantially performed the contract when it was terminated in January 2004. The court also concluded that although the foundation elevation was not specified in the contract, it was specified in the survey and the survey was "part and parcel of the contract." It ruled that Uselmann was not entitled to any further compensation and that the contract was justifiably terminated. Klinzing did not recover on his counterclaims.[1] Klinzing was awarded his costs and attorney fees of $7899.66, in defending the lawsuit based on the finding that the lawsuit was frivolous.

¶5 Uselmann argues that there was no material breach of the contract because the foundation elevation was not specified in the contract and was not part of the contract. He attempts to characterize the case as one of contract interpretation.

¶6 We reject Uselmann's attempt to characterize the issue as one of contract interpretation. The case was submitted to the trial court on the question

[1] Concluding that Klinzing's business income was not affected by time he devoted to completing the house, the trial court rejected Klinzing's counterclaim for the value of labor put into the house. It also found the claim that delays caused an increase in Klinzing's interest expense to be speculative and denied damages for increased interest payments over the course of the mortgage.

of whether termination of the contract was unjustified so that Uselmann could recover the balance of the contract price. We consider whether sufficient evidence supports the trial court's findings.

¶7 The trial court's factual findings will not be reversed unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2003-04).[2] We review the record in the light most favorable to the trial court's findings to determine whether the findings are clearly erroneous. *See* ***Rohde-Giovanni v. Baumgart***, 2003 WI App 136, ¶18, 266 Wis. 2d 339, 667 N.W.2d 718. The credibility of witnesses and the weight to be attached to that evidence are matters uniquely within the province of the trial court when it acts as the finder of fact. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶8 Whether the facts found by the trial court constitute a breach of contract is a legal issue we review de novo. ***Steele v. Pacesetter Motor Cars, Inc.***, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141. In evaluating a breach of contract claim, the trial court must determine whether a party has violated the terms of the contract and whether any such violation is material such that it has resulted in damages. ***Id.*** Whether a party's breach of the contract is material is a question of fact. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183-84, 557 N.W.2d 67 (1996).

¶9 We first recognize that even though the foundation elevation was not specified in the contract, it is undisputed that the elevation was too high and not in conformity with the parties' expectations. The elevation was set in the survey and

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the survey was used to obtain the building permit. There was evidence that the survey becomes part of the building plan. Uselmann acknowledged that the elevation of the foundation did not conform to the parties' expectations and attempted to get Klinzing to "sign off" on the problem. Thus, as a matter of law, the error with respect to the elevation violated Uselmann's obligation to build "per plan."

¶10 The trial court found that Uselmann engaged in a work slowdown in an attempt to extract Klinzing's acceptance of the wrong elevation. The evidence supports that finding. The court determined that Klinzing's testimony that little work was done on the house in September and October 2003 was more credible than Uselmann's claim that he was working as diligently as possible. The court rejected Uselmann's testimony that change orders delayed progress on the house. Also, the contract provided that the house would be completed within six months. But six months after starting, the house was nothing more than a shell. There was evidence that at the time the contract was terminated, the house was not in such a condition that it could be completed within the original six months, or even within a month as Uselmann then promised. Thus, there was a breach of the contract with respect to completion time.

¶11 The breaches of the contract with respect to the foundation elevation and completion time were found to be material. Uselmann testified that the elevation problem required extra fill by the front and back doors of the house, the retaining wall had to be taller and longer, and the driveway was unusually steep. He also indicated that because of the delay in completing the house, exposure to the elements was soaking the fascia, woodwork and subfloors. This demonstrates that Uselmann's nonperformance in accordance with the plan and contract was material. We affirm the trial court's determination that termination of the contract

was justified and Uselmann was not entitled to remaining sums due under the contract.

¶12 Uselmann argues that he should be permitted to recover under restitution or quantum meruit theories. *See* ***Kreyer v. Driscoll***, 39 Wis. 2d 540, 547, 159 N.W.2d 680 (1968) (where contractor failed to properly complete construction on a house, the contractor still could collect for the work already completed on a theory of quantum meruit or restitution). That theory of recovery was not pled in the complaint and not raised in the trial court. We do not consider an alternative theory for the first time on appeal. *See* ***Cook & Franke, S.C. v. Meilman***, 136 Wis. 2d 434, 436, 402 N.W.2d 361 (Ct. App. 1987).

¶13 We turn to the trial court's award of costs and attorney fees based on a finding that Uselmann's action was frivolous under WIS. STAT. § 814.025.[3] We cannot ignore that the trial court's initial determination that Klinzing should recover his expense of defending the case was not firmly footed on the application of § 814.025. The trial court's initial rationale was:

> I am going to award [Klinzing's attorney] his costs because I don't believe Mr. Uselmann acted in good faith in negotiating this contract. I shouldn't say in negotiating this contract, but in negotiating how the problem in the elevation was going to be handled. I do believe that there was a work slow-down in September and October because of the inability of these parties to resolve that issue. And I think it's unfair to the defendant to have to be here to have to defend this lawsuit when in my opinion the plaintiff isn't coming in to court with clean hands.

[3] Supreme Court Order 03-06 repealed and recreated WIS. STAT. § 802.05 and repealed WIS. STAT. § 814.025. S. CT. ORDER, 2005 WI 38, 2005 WI 86 (eff. July 1, 2005). This matter was tried before the effective date of those changes.

¶14 When pressed for a basis for the award of attorney fees, the trial court indicated that there was ample evidence to support a finding of frivolousness and that, based on Uselmann's conduct, there was no basis in law or equity for the suit. The order for judgment indicated that the award was made pursuant to WIS. STAT. § 814.025, and pursuant to the "equitable powers of this Court to award attorney's fees and costs."[4]

¶15 To find an action frivolous, WIS. STAT. § 814.025(3) requires the trial court to find either "(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another" or "(b) The party or the party's attorney knew, or should have known, that the action ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." The statute does not allow the trial court to conclude frivolousness or lack of it without findings stating which statutory criteria were present. ***Sommer v. Carr***, 99 Wis. 2d 789, 792, 299 N.W.2d 856 (1981). Whether the party or attorney knew or should have known that the position taken was frivolous is determined objectively by what a reasonable party or attorney would have known or should have known under the same or similar circumstances. ***Howell v. Denomie***, 2005 WI 81, ¶8,

[4] The American rule is that attorney fees are not allowable unless a statute or an agreement of the parties provides otherwise. The only recognized equitable exception is the ***Weinhagen*** rule. *See* ***Meas v. Young***, 142 Wis. 2d 95, 101, 417 N.W.2d 55 (Ct. App. 1987). The holding of ***Weinhagen v. Hayes***, 179 Wis. 62, 65, 190 N.W. 1002 (1922), is that where "the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him [or her] in such relation with others as to make it necessary to incur expense to protect his [or her] interest, such costs and expense should be treated as the legal consequences of the original wrongful act." Klinzing does not assert that the ***Weinhagen*** rule provides a basis for the award of attorney fees incurred in this litigation.

282 Wis. 2d 130, 698 N.W.2d 621, *reconsideration denied,* 2005 WI 150, 286 Wis. 2d 104, 705 N.W.2d 664. The ultimate conclusion about whether what was known or should have been known supports a determination of frivolousness is a question of law we review independently of the trial court. ***Id.*** "'All doubts on this issue are resolved in favor of the party or attorney' whom it is claimed commenced or continued a frivolous action." ***Id.*** (quoted source omitted).

¶16 The trial court's conclusion that the action was frivolous was nothing more than an afterthought and did not include required findings. We conclude the evidence here does not support a conclusion that the action had no basis in law or fact. A contract claim was brought. Disputed issues of fact existed as to the parties' performance under the contract and whether termination of the contract was justified. "A claim is not frivolous merely because there was a failure of proof or because a claim was later shown to be incorrect." ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 551, 597 N.W.2d 744 (1999). The trial court's assessment that Uselmann did not act in good faith to remedy the foundation problem is not a proper consideration. We reverse the money judgment in favor of Klinzing for costs and attorney fees incurred in defending the action.

¶17 No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.